

VIA E-MAIL

Mr. Donald S. Clark  
Secretary  
Federal Trade Commission  
600 Pennsylvania Avenue, N.W.  
Washington, D.C. 20580

Re: CAN-SPAM Act Rulemaking, Project No. R411008

Dear Secretary Clark:

The signatories to this letter include ICANN accredited domain name registrars (“registrars”), which cumulatively represent over half of the consumers of domain names (“registrants”). We all e-mail current, past and prospective customers, for both informational and commercial purposes, and are therefore interested in implementing rules that take into account pragmatic business and technology issues related to e-mail. As legitimate businesses, we support the goal behind the CAN-SPAM Act of reducing unsolicited, unwanted and annoying spam, and in so doing protecting legitimate businesses’ e-mails.

Definition of Primarily Commercial

The Commission requested comments on criteria for determining whether “the primary purpose” of an e-mail is commercial.

We believe that the primary purpose of an e-mail should be judged by its overall content. The mere fact that an e-mail contains promotions or advertisements should not qualify it as “primarily commercial.”

In particular, e-mails that provide information are analogous to on-line journals, which are not generally considered spam. Even if such a “newsletter” contains editorial content or advertisements, its primary purpose is informational, and should not be considered primarily commercial.

Transactional or Relationship Message

On a related note, the Commission requested comments regarding clarification of transactional or relationship messages and the terms, “facilitate, complete, or confirm” and “notice concerning a change in the terms or features.”

We would welcome a clarification that takes into account the nature of the relationship between merchant and customer. Different businesses and different types of customers call for different types of messages. It is impossible to fit all those relationships into a few narrow categories of communications. In many cases, e-mails to customers provide

not only updates on past services, but also information on enhancements, upgrades, and related services, all of which “facilitate” delivery of a good overall customer service. Where a customer relationship has existed, proscribing e-mails into a narrow category stymies legitimate relationship-building contacts and delivery of useful information from a known source.

### Labeling

Section 11(2) contemplates the means for making commercial e-mail identifiable from its subject line and requires the Commission to submit a report that sets forth a plan for requiring commercial e-mail to be identifiable from its subject line, or an explanation of any concerns the Commission has that cause the Commission to recommend against the plan.

While we appreciate the goal of distinguishing between commercial and non-commercial e-mail, we believe that mechanical labeling requirements would only serve to punish legitimate commercial e-mail without ending spam. The litmus test should be whether recipients are able to easily distinguish spam from legitimate e-mail. An overly simplistic label requirement would not advance that goal – especially since illegitimate spammers could easily detour a labeling restriction. If a simplistic label is used, spam-blocking programs would be set to recognize specific labels such as "ADV." Spammers would simply either not use the labels or change the term (such as by inserting periods) in order not to get caught. Since many of the worst spam abusers are small fly by night operators located outside of the U.S., they are unlikely to get caught. The benefit of maintaining flexibility in e-mail labeling is to be able to serve the many different audiences, speaking different languages, reached through e-mail. Therefore, we recommend that the Commission recommend against a strict labeling plan.

### Sender Identification

Section 3 (16) defines when a person is a “sender” of commercial e-mail. The definition appears to contemplate that more than one person can be a “sender” of commercial e-mail. The Act defines “initiate” to include procuring the origination or transmission of an e-mail, and the term “procure” means to provide consideration, or “induce” a person to initiate a message on one’s behalf. The Commission requested comments on whether “forward-to-a-friend” and similar “forwarding” marketing campaigns that rely on customers to refer or forward commercial e-mails to someone else fall within the parameters of “inducing” a person to initiate a message on behalf of someone else.

We believe that "forward-to-a-friend" and similar e-mails are legitimate, so the Commission’s rules should be crafted in a manner that allows such e-mails to continue. Consumers often make decisions based on friends’ recommendations. There is nothing untoward in a company asking its customers to recommend its goods and services. As long as such requests are not fraudulent, the “forward-to-a-friend” e-mails simply serve to simplify the process of making recommendations. If the Commission were to stop such e-mails, it would be doing a disservice both to legitimate commercial use of the Internet and to consumers, who benefit from making and receiving the recommendations.

### Prohibited Harvesting

The Commission requested comments regarding Section 5(b)'s definition of "aggravated violations." Section 5(b) defines a prohibited practice as obtaining e-mail addresses using "automated means from an Internet website or proprietary online service."

We applaud the increased protection against harvesting and mining. Domain name registrars have found that their Whois databases of customers' contact information is often subject to such harvesting. We, therefore, request that the Commission make clear that the Whois database is among such protected online services.

Furthermore, manual, as well as automated, methods, are used to obtain e-mail addresses in violation of an Internet website's posted notice, the website's contractual requirements, or the general legal prohibitions against breaking and entering. Such manual harvesting is likewise a low-cost method for spammers to illegally obtain addresses and send spam. Since it is nearly as simple and cost-free to accomplish and leads to the same prohibited results as automatic harvesting, manual harvesting methods should be penalized along with automated harvesting methods. We therefore request that the Commission in its rule-making authority under Section 5(c)(2) include manual harvesting methods in the prohibition under Section 5(b).

Thank you for the opportunity to comment.

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Register.com, Inc.  
Tucows, Inc.